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Supreme Court of the United States

OCTOBER TERM, 1929

No. 43

UNITED STATES OF AMERICA,
Petitioner

vs.

IRON CAP COPPER COMPANY,
Respondent

BRIEF FOR IRON CAP COPPER COMPANY IN OPPOSITION TO PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BURTON E. EAMES,
Attorney for Iron Cap Copper Company, Respondent.

PRESS OF GEO. H. DEAN CO., BOSTON

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Supreme Court of the United States

OCTOBER TERM, 1929
No. 633

UNITED STATES OF AMERICA,
Petitioner

vs.

IRON CAP COPPER COMPANY,
Respondent

BRIEF FOR IRON CAP COPPER COMPANY IN OPPOSITION TO PETITION OF THE UNITED STATES OF AMERICA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

This is a petition by the United States for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the First Circuit.

INTRODUCTORY STATEMENT.

This action was originally brought in the District Court of the United States for the District of Massachusetts by Iron Cap Copper Company against the United States of America, to recover interest on certain amounts overpaid by said Iron Cap Copper Company

for income and profits taxes for 1918 which were applied as credits on additional assessments for other years.

The case was heard in the District Court upon an agreed statement of facts and oral evidence by one witness on behalf of the United States. The court found in favor of the plaintiff and entered judgment on June 24, 1919 (Rec. pp. 41-49).

The case was appealed by the United States to the United States Circuit Court of Appeals for the First Circuit and the record there, in addition to the agreed statement of facts, contained certain additional facts as set out in the opinion of the District Judge, and certain additional special findings (Rec. pp. 27-40).

The United States Circuit Court of Appeals for the First Circuit affirmed the decision of the District Court and the United States now asks this Court for a writ of certiorari to review that decision.

The question involved in the case is *when the credit was allowed;* that is, on which of the three following dates: (1) March 29, 1924, when the Commissioner certified a Schedule of Overassessments showing that the plaintiff had been overassessed for 1918 in the sum of $180,322.66, (2) July 14, 1924, when the Collector reported back to the Commissioner as directed, showing that of the total overassessment the appropriate amounts of abatement, credit and refund were as follows:

Abatement	$48,539.94
Credit	102,931.89
Refund	28,850.83

(3) August 7, 1924, when the Deputy Commissioner certified to the Commissioner his approval, and when the

Commissioner signed the authorization to the Disbursing Clerk, finally fixing the amount of the refund and authorizing its payment.

The date of the allowance of the credit was material because if it was "allowed" *before* June 2, 1924 (the effective date of the Revenue Act of 1924) the legal result of the allowance is determined under the Revenue Act of 1921, while if it was "allowed" *after* June 2, 1924 the legal result is determined under the Revenue Act of 1924. It is the rule that interest on *refunds* is to be computed in conformity with the law in force at the time of the allowance of the refund.

> *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160.
>
> *Blair, Commissioner,* v. *United States, ex rel. Birkenstock,* 271 U. S. 348.

It is agreed by both the petitioner and the respondent, that the same is true in the case of a claim for *credit* (Petitioner's Brief, p. 16).

If the credit in this case was allowed before June 2, 1924 and therefore under the Act of 1921, then interest on the credit would run *to* the date of allowance of the credit but only *from* six months after filing of claim by respondent (plaintiff). If it was allowed after June 2, 1924 and under the Act of 1924, then interest would run *from* date of payment of tax *to* the dates of the additional assessments against which the overpayment was credited. The latter was the more advantageous to the respondent (plaintiff).

The District Court and the United States Circuit Court of appeals for the First Circuit, following the statement by this Court in *Girard Trust Company* v.

United States, 270 U. S. 163, held that the date of allowance of the credit, like the date of allowance of the refund, was August 7, 1924, the date when the Commissioner signed his final schedule and authorized payment of the refund, that being the date when its "exact amount" was "fixed finally by competent authority", and that respondent (plaintiff below) is accordingly entitled to interest on the amount of the credit, under the Revenue Act of 1924. The petitioner here contends that this decision was wrong, and seeks to obtain a reversal.

STATEMENT OF FACTS.

The respondent (plaintiff below) duly filed its income and profits tax return for the year 1918, showing taxes due in the sum of $183,099.78, which amount was duly paid (Agreed Facts, Par. IV, Rec. pp. 7-8). After an examination and audit the Commissioner determined that the respondent was liable to an additional tax for 1918 in the sum of $48,539.94 and on June 11, 1921, the Commissioner made an additional assessment upon the respondent in that amount (Agreed Facts, Pars. VII-VIII, Rec. pp. 8-9). This made a total assessment for 1918 of $231,639.72.

After various audits it was finally determined that the correct tax assessable upon the respondent for 1918 was $51,317.06 and that accordingly there had been an overassessment of $180,322.66 and on March 29, 1924, the Commissioner of Internal Revenue approved a "*Schedule of Overassessments*" which included the abovementioned overassessment against the respondent for the year 1918 in the sum of $180,322.66. This schedule was transmitted to the Collector with the following "Author-

ization of Commissioner". (Agreed Facts, Pars. XII and XIV, Rec. pp. 10-11 and Exhibit Annexed.)

"To the Collector.....District of Massachusetts

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the 'Certificates of Overassessment' or 'Notices of Adjustment of Refund' attached thereto.

You will immediately check such items against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the condition of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, making the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7805-A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7805-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7805-A, and return the necessary copies of each to the Commissioner of Internal Revenue.

Date March 29, 1924.

D. H. BLAIR
Commissioner of Internal Revenue."

The Collector determined the respective amounts which were to be abated, credited and refunded and on July 14, 1924, returned the Schedule of Overassessments with the following certificate to the Commissioner.

"CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated herein.

Date July 14, 1924.

Collector.....District of Mass.
M. E. NICHOLS"

Under the same date he also returned the subsidiary "Schedule of Refunds and Credits" (copy also annexed to Agreed Facts) with the following certificate:—

"CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items hereon are relisted as they appeared for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named disclosed such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date July 14, 1924

M. E. NICHOLS
Collector.....District of Mass."

The Schedule of Overassessments as so returned by the Collector to the Commissioner showed the amount of abatement, $48,539.94, the amount of the credits, $102,931.89 (specifying particular taxes for other years upon which the credits were applied), and the amount to be refunded, $28,850.83. The subsidiary "Schedule of Refunds and Credits" showed the amount of the credits and the amount of the refund but not the amount of abatement.

Without going into unnecessary detail regarding the determination of the taxes for other years, upon which taxes the $102,931.89, allowed as a credit, was applied, it is sufficient to state that the credit was all applied on additional assessments and that the respective amounts so credited, the years to which the other taxes in question related, and the dates of the additional assessments were as follows. (Agreed Facts, Par. XV, Rec. pp. 11-12. See also schedule attached to Collector's subsidiary "Schedule of Refunds and Credits".)

"Amounts Credited	Year Against Which Credited			Dates of Assessment
$ 6,300.77	Add'l assessment		1917	8/18/18
50,962.85	"	"	"	5/25/20
59.85	"	"	1916	6/11/21
20,061.60	"	"	1917	6/11/21
20.04	"	"	1913	3/20/24
17.30	"	"	1914	3/20/24
14.74	"	"	1915	3/20/24
18.41	"	"	1916	3/20/24
25,476.33	"	"	1917	3/20/24
$102,931.89	Total amount credited."			

After the Collector had returned to the Commissioner the "Schedule of Overassessments" with the Collector's

figures of abatement, credit and refund thereon and his subsidiary "Schedule of Refunds and Credits", again listing the amounts of the credits and the amounts of the refunds, the Deputy Commissioner certified to the Commissioner on August 7, 1924 (on the "Schedule of Refunds and Credits"), as follows:

"CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed and the accrued interest, if any, listed in column 6 has been found due.

Date August 7, 1924

J. G. BRIGHT
Deputy Commissioner."

On the same date the Commissioner signed the authorization for payment of the refunds in the following language:

"AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date August 7, 1924

D. H. BLAIR
Commissioner of Internal Revenue."

On February 21, 1928, in pursuance of a request by the respondent for an allowance of interest on its overpayment, the Commissioner advised the respondent of the allowance of interest in the amount of $8,033.57 on $28,850.83, the amount *refunded,* from the date of payment to the date of allowance of the refund. The schedule based on this computation and allowance of interest was approved on May 11, 1928, and payment was made on May 15, 1928. (Agreed Facts, Pars. XVII, XVIII, Rec. p. 13.)

The Commissioner declined to allow any further interest on account of the overassessment of $180,322.66 for the year 1918, and specifically no interest has been paid or allowed upon the amounts of the credits of $102,931.89. (Agreed Facts, Par. XX, Rec. p. 13.)

It was conceded below and is one of the special findings of fact made by the District Judge that there is no record of the actual date of applications of credits on the Collector's books and that the *official application of the credit by the Collector is the date on which he signs the subsidiary "Schedule of Refunds and Credits".* This date, in the present case, was July 14, 1924 (Rec. p. 40).

There are three possible dates upon which it may be argued the credits were "allowed". These dates are given above, but we repeat them here for convenience.

1. March 29, 1924, the date when the Commissioner signed and transmitted to the Collector his original "Schedule of Overassessments".

2. July 14, 1924, the date when the Collector (a) certified on the "Schedule of Overassessments" that he had checked the items of overassessments with the taxpayer's accounts and stated to the Commismissioner the amounts which he had applied as

abatements and credits on their accounts and the net amounts which he found to be refundable, and (b) signed the subsidiary "Schedule of Refunds and Credits" again certifying the amounts which he had determined as the proper amounts of credit and refund.

3. August 7, 1924, the date when the Commissioner indicated his approval of the Collector's figures by signing the authorization for payment of the refunds.

Obviously, if the first of these dates is taken the allowance was made under the Revenue Act of 1921, while if either of the other dates is taken the allowance was made under the Revenue Act of 1924 and is governed by the provisions of that Act and the respondent (plaintiff) is entitled to the interest claimed.

The Government argues for the first of the three dates, namely, March 29, 1924, the date of the Commissioner's original Schedule of Overassessments. The respondent, on the other hand, argues that both under the authority of *Girard Trust Company* v. *United States,* 270 U. S. 163, and other decisions cited below, and as a matter of principle, the true date of allowance was August 7, 1924, when the Commissioner approved the amounts of the credits and refunds indicated by the Collector; or in the alternative, that the credits can not be said to have been allowed in any case earlier than July 14, 1924, the date of the Collector's certification on the schedules returned by him to the Commissioner, upon which he fixed for the first time the amounts of the abatements, credits and refunds to which the taxpayers were entitled.

STATUTES WHICH MAY BE MATERIAL.

Revenue Act of 1921: (42 Stat. ch. 136)

"REFUNDS

Sec. 252 (a). That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer:"

"INTEREST ON REFUNDS AND JUDGMENTS.

Sec. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows:

(1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or

(2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or

(3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit.

The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

Revenue Act of 1924: (43 Stat. ch. 234)

"OVERPAYMENTS.

Sec. 272. If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281."

"CREDITS AND REFUNDS.

Sec. 281. (a) Where there has been an overpayment of any income, war profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"INTEREST ON REFUNDS AND CREDITS.

Sec. 1019. Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part."

Revised Statutes, Section 3220:

(This section appeared as Section 1315 in the Revenue Act of 1921 and was reenacted without change as Section 1011 of the Revenue Act of 1924.)

"Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him

by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Revenue Act of 1926: (44 Stat. ch. 27)

"CREDITS AND REFUNDS"

"SEC. 284. (a) Where there has been an over-payment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

"INTEREST ON REFUNDS AND CREDITS"

"SEC. 1116. (a) Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit

is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

(b) As used in this section—

(1) The term 'additional assessment' means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency under Title II or Title III of the Revenue Act of 1924 or of this Act;

(2) The term 'date of the allowance of the refund' means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date."

Revenue Act of 1928: (45 Stat. ch. 852)

"REFUNDS AND CREDITS"

"SEC. 322. (a) AUTHORIZATION. Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

INTEREST ON OVERPAYMENTS

"SEC. 614. (a) Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax, at the rate of 6 per centum per annum, as follows:

(1) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921 or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

(b) As used in this section the term 'additional assessment' means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924 or by any subsequent revenue act.

(c) Section 1116 of the Revenue Act of 1926 is repealed.

(d) Subsections (a), (b), and (c) shall take effect on the expiration of thirty days after the enactment of this Act, and shall be applicable to any credit taken or refund paid after the expiration of such period, even though allowed prior thereto."

THE REASONS UPON WHICH PETITIONER BASES THIS PETITION FOR CERTIORARI.

The reasons stated by the petitioner as the basis of its request for a writ of *certiorari* are the following in substance:

1. That the question when a credit is allowed has not been decided by this Court and that the language

in the *Girard Trust Company* case upon this point was ill considered.

2. That the decision of the District Court and the Circuit Court of Appeals in accordance with the language in the *Girard Trust Company* case overturns a rule as to computation of interest on credits heretofore followed by the Bureau of Internal Revenue in many cases and substitutes a rule which cannot be uniformly applied.

3. That there is "some conflict in the decisions of the lower Federal Courts", the Court of Claims in *Swift & Company vs. United States,* having adopted the view laid down in the instant cases and the District Court of the United States for the Western District of Pennsylvania in the case of *Penn Smokeless Coal Company vs. United States,* 34 Fed. (2d) 205 having held *contra.*

4. That the cases are of great importance to the United States and to the public because of large amounts of money involved in previous credit allowances and because of certain reasons having to do with Statutes of Limitations.

The respondent respectfully submits that none of these alleged reasons are sufficient and that there are no valid reasons for granting the writ.

ARGUMENT.

An examination of the facts and circumstances of this case and of the decisions of the various federal courts which have dealt with this question of when a credit is "allowed" make it clear (1) that there is no real conflict in the decisions of the lower courts; (2) that the question here involved is not of substantial public importance but is chiefly of mere historical interest; (3) that there is certainly no public necessity which requires the rule of law to be changed so as to accord with a practice adopted by the Bureau of Internal Revenue in computing interest on credits, and (4) that in any case the *dictum* in the *Girard Trust Company* case was a sound statement of the law.

No Real Conflict In Decisions Of Lower Courts.

The decisions of the Court of Claims in *Swift Company vs. United States* (May 6, 1929, unreported—rehearing denied December 2, 1929), and the decision of the District Court of the United States for the District of Massachusetts, (Judge Morton) in the *Iron Cap Copper Company* case, 31 Fed. (2d) 628, and the decision of the United States Circuit Court of Appeals for the First Circuit in both these cases, 35 Fed. (2d) 560, are all to the same effect. All follow the statement of the rule as laid down by this Court in the *Girard Trust Company* case, and hold that the effective date of allowance of the credit was when the Commissioner finally approved the Schedule of Refunds and Credits, after it had been returned to him by the Collector. This date in the present case was August 7, 1924. Judge Brewster in

the *Boston Buick* case, in the District Court, 27 Fed. (2d) 395, was in substantial agreement but found it unnecessary to decide whether the date of allowance was when the Collector returned the Schedule of Refunds and Credits to the Commissioner or when the latter finally approved said Schedules, because both dates were subsequent to June 2, 1924, the effective date of the 1924 Act. He was entirely clear that the credit was not allowed when the Commissioner signed the original Schedule of Overassessments.

The only apparent dissent is that in *Penn Smokeless Coal Company vs. United States,* 34 Fed. (2d) 205, in which, as the United States Circuit Court of Appeals in the instant cases said, "the sitting judge * * * inadvertently misconstrued the opinion of the Chief Justice in the *Girard Trust Company* case." (Rec. p. 57.) The mistake of the court in that case is so evident that it may well be assumed the court itself would have been the first to correct it if it had but been called to his attention.

In that case it appears that the schedule of overassessments was signed and transmitted to the Collector on January 13, 1926; that the Collector on January 28, 1926, certified and returned to the Commissioner the Schedule of Refunds and Credits and that the approval and authorization of the Commissioner was signed on March 11, 1928. The issue was whether the credit was allowed under the Revenue Act of 1926 which was enacted February 26, 1926, or under the previous act, that of 1924. It was held that the credit was allowed prior to the effective date of the 1926 Act and the language of the court indicates the view that the credit was allowed when the Commissioner signed the original Schedule of Overassessments. This is in accord with the Government's

theory. An examination of the case shows the Court's palpable misapprehension of what Chief Justice Taft had stated in *Girard Trust Company vs. United States,* for in the course of its opinion the Court says:

> "In Girard Trust Co. vs. United States, supra, the Court, in the opinion by Mr. Chief Justice Taft, laid down a rule, as follows: 'A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund.' * * * * * Applying the rule laid down in Girard Trust Co. vs. United States to the actual procedure in the Bureau of Internal Revenue, the credit to the plaintiff was allowed when the Commissioner approved the Schedule of Overassessments * * * * * for transmission to the Collector, and thus directed the latter to credit plaintiff with the amount of its overpayments of 1918 taxes against other taxes owed by it."

This statement by the District Court of "the rule laid down" by the Chief Justice in the *Girard Trust Company* case is erroneous and is directly *contra* to what the Chief Justice actually said. What the Chief Justice did say appears at pages 169, 170, 171 thereof, as follows:

> "The Treasury Department by its regulations of 1922 construed this provision as follows:
>
> > 'A claim for refund or credit is allowed within the meaning of the statute when the Commissioner approves the schedule in whole or in part, for transmission to the proper accounting officer, for credit or refund.' * * *
>
> We cannot concur, however, in the view of the Treasury Department that the date of the allowance of the

claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the Collector of Internal Revenue, who made the collection and keeps the account with the taxpayer."

In other words, what the Pennsylvania Court cites as a rule laid down by the Chief Justice, was in reality a rule which the Chief Justice said the Treasury Department had laid down but in which the Supreme Court refused to concur. This would seem to make the authority of the decision of the Pennsylvania Court of negligible importance.

No Question of Substantial Public Importance Is Here Involved.

In the first place the respondent submits that there is nothing in the record which justifies the allegations in the petition as to the amount of money involved in pending interest cases and nothing to show that any injustice will result either to the United States or to the taxpayers from a definite adherence to the rule of law as stated by this Court in the *Girard Trust Company* case.

Moreover, an examination of the provisions of the succeeding revenue acts, as hereinbefore set out, discloses that the question as to just when a credit is "allowed" has become largely a matter of mere historical importance.

We may summarize the provisions of the successive Revenue Acts in the matter of interest payable on refunds and credits (which are set out above—pp. 11-16) as follows:

Act of 1921, *Sec.* 1324 (*a*):

Interest on refund or credit *from* date indicated below to date of allowance.

1. If amount was paid under specific protest, then from date tax was paid.
2. If paid without protest but pursuant to additional assessment, then from time additional assessment was paid.
3. If paid without protest and not pursuant to additional assessment, then from six months after filing claim.

Act of 1924, *Sec.* 1019:

Interest allowed on refund from date of payment of tax to date of allowance of refund.

Interest allowed on credit from date of payment of tax to

Due date of amount against which credit is taken,

but if taken against an additional assessment, then to date of assessment.

Act of 1926, *Sec.* 1116:

Interest allowed on refund from date of payment of tax to date of allowance of refund.

Interest allowed on credit from date of payment of tax to

Due date of amount against which credit is taken,

but if taken against additional assessment under Revenue Acts of 1921, 1924 or 1926, then to date of additional assessment.

Act of 1928, *Sec.* 614:

> Interest allowed on refund from date of overpayment of tax to date not more than thirty days before date of refund check.
>
> Interest allowed on credit from date of overpayment to
>
> Due date of amount against which credit is taken,
>
> but if taken against additional assessment under Revenue Act of 1921, or any subsequent revenue act, then to date of additional assessment.

It will be seen from the above summary that while the date of allowance of a credit was, under the Act of 1921, the date to which interest on the credit was figured, this is not true under any subsequent acts. With respect to all credits "allowed" since June 2, 1924, the effective date of the Revenue Act of 1924, the only question as to which the date of allowance of a credit may be material is the question under which of the acts the interest is to be computed. In the *Penn Smokeless* case it was a material question whether the credit was allowed while the Revenue Act of 1924 was in effect or not until after the Revenue Act of 1926 became effective. The overpayment in that case was an overpayment of taxes for 1918 which had been credited on an additional tax assessed for 1919 and the question was material because if allowed under the Act of 1926 interest ran to the date of the additional assessment only if such additional assessment was made under the Revenue Act of 1921, or some subsequent act, whereas if it was allowed under the Act of 1924 interest ran to the date of the additional assessment, even if it related back to 1919.

Since the Revenue Act of 1926 became effective February 26, 1926, there has been no change in substance in the provisions regarding interest on credits. Consequently, as to any credits allowed since February 26, 1926, the date of allowance is wholly immaterial as bearing on this interest question. The beginning and the end of the interest period in the case of interest on credits is determined entirely by other facts; and as there has been no change of substance in the provisions of the law regarding interest, it does not matter which Revenue Act was in effect at the time of the allowance.

As to any credits allowed before February 26, 1926, all adjustments of interest resting on such allowance have doubtless in most cases been made long since. In view of the short Statute of Limitations, it seems fair to assume that not many of these cases remain open for adjustment. In any case the interest of the United States and of the taxpaying public will be properly served if the adjustments are made in accordance with the rule laid down in the *Girard Trust Company* case.

The Government argues that the action of Congress in the Revenue Act of 1926, in fixing the date of allowance of refunds as the date of the original Schedule of Overassessments, without making similar provision as to interest on credits, indicated that Congress deemed credits to be allowed at the date of said original Schedule in accordance with the Bureau practice. As a matter of fact the date of allowance in the case of a refund still continued to be material under the 1926 Act, because interest ran to that date, while in the case of a credit the date of allowance of the credit was *not* material, as interest ran from the date of the overpayment to the due date of the amount against which the credit was taken,

or if taken against an additional assessment then to the date of the assessment. In view of this fact and of the further fact that the *Girard Trust Company* decision had been handed down nearly a year prior to the 1926 Act, the more logical conclusion is that Congress decided to leave the matter of past credit allowances as it had been left by the dictum of this Court. At any rate Congress did not undertake to make this rule as to date of allowance retroactive even as to refunds.

No Public Necessity Exists Requiring the Rule of Law to Be Changed to Accord with a Practice of the Bureau of Internal Revenue.

The statement made by Mr. Chief Justice Taft in the *Girard Trust Company* case, which has been followed ever since in all the decisions of the lower Federal Courts (except only the *Penn Smokeless* case above discussed) was laid down on March 1, 1926.

It was there stated (pp. 170-171):

> "The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund *or credit* should be granted, and *when he has made that decision finally,* he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section.
>
> * * * * * *
>
> The findings and the exhibits show that the course of business is that the Collector on receiving from the Commissioner the schedule as to the overassessment, examines his books and reports back to the Bureau the amount which should be credited on taxes due and the amount to be refunded, that this is examined by the Assistant Commissioner and then is delivered to the

> Commissioner, *who makes it effective by his approval.* Until it reaches him and is approved by him, the refund cannot be paid. *This we think is the real date of allowance. Until that time, the exact amount of the refund is not fixed finally by competent authority.* This date would seem to be just as certain and convenient from an administrative standpoint as that of the original decision of the Commissioner, and it is certainly more in conformity to the general purpose of Congress to relieve the overassessed taxpayer by paying compensatory interest on money unjustly taken and kept by the Government." (Italics ours.)

If the rule thus stated by this Court, which is applicable *equally to refunds and credits,* has since that time for the most part been disregarded by the Bureau of Internal Revenue, it is doubtless unfortunate but that fact hardly furnishes a reason for changing the rule.

As Mr. Justice Wilson noted in the opinion of the Circuit Court of Appeals in the instant cases (Rec. p. 56):

> "It (the Treasury Department) also, prior to the decision in the Girard Trust Company case, had the same regulation as to the date of allowance of refunds; yet the court in that case held that a regulation of the Treasury Department and its practice in this respect was not in accord with the statute and that it did not control the plain effect of the acts of the Commissioner and the Collector. No good reason is now shown why the Department regulation as to the allowance of credits should control what appears to be the only reasonable inference to be drawn from the facts."

The Dictum in the Girard Trust Company Case Was a Sound Statement of the Law.

In *Girard Trust Company vs. United States,* 270 U. S. 163, (decided March 1, 1926) this question was squarely raised and definitely decided in its application to a re-

fund, so that were this a case of a refund and not a credit no room would exist for argument. In that case, as in the case at bar, the question turned upon the "date of allowance" of the refund. The Commissioner had signed his schedule of overassessments on December 9, 1922. This schedule was sent to the Collector with the usual instructions to examine the accounts of the taxpayers, to make the abatements called for and to apply the credits and report back the amounts of credits and refunds (for details of Commissioner's authorization see Form 7777—Rec. pp. 28-29). The Collector reported back to the Commissioner as directed, the Assistant Commissioner confirmed the report and the Commissioner directed the refund on January 16, 1923. It was held that the date of allowance of the refund and the date to which interest on the refund must run, was January 16, 1923, when the Commissioner finally directed the refund.

It seems reasonably clear that in the discussion quoted above at pages 25-26 the Supreme Court regarded credits and refunds in the same light and deemed the final date when the Commissioner approved the Collector's schedule of refunds and credits as the real date of allowance in either case.

It is difficult to understand how the counsel for the Government can argue that although the Commissioner's decision on *refunds* is not final until his final approval, nevertheless his decision on *abatements and credits* is final when he signs the original certificate of overassessments. If, as the Court stated in the *Girard Trust Company* case, "the exact amount of the refund" must be "fixed finally by competent authority" (i. e. by the Commissioner) before the refund can be said to have been allowed, it must be equally true that the exact

amount of a credit must be "fixed finally" by the same competent authority before the credit can be said to have been allowed.

In his original "Schedule of Overassessments" the Commissioner did not purport to fix the amount of either credit or refund. He merely certified his decision that the taxpayer had been *overassessed* in a certain amount. He was not deciding, and indeed he could not decide, how much of the overassessment should be merely abated, how much should be credited on taxes for other years and how much should be refunded. For, as the record shows, the Commissioner had no knowledge of the status of the taxpayer's accounts, and only in the Collector's office was the necessary information available to determine how much of the overassessment found by the Commissioner was to be abated, how much to be credited and how much to be refunded. (Rec. p. 39.) Before any of these items could be determined the Collector, who is the Commissioner's subordinate and representative, must examine the taxpayer's accounts and ascertain (1) how much of the total assessment the taxpayer has paid, and (2) how much the taxpayer owes for unpaid taxes for other years. In this manner the Collector determines (1) what amount of the overassessment has not been paid and should therefore be abated, (2) what amount of the actual overpayment should be applied or credited on the unpaid taxes for other years, and (3) what is the balance of the overpayment, if any, which should be refunded.

It would have been possible for the Supreme Court in the *Girard Trust Company* case to regard the date of the certificate of overassessment as the date of allowance of both credits and refunds, even though an investigation

of facts following that original schedule was necessary in order to determine the *amounts* of either credits or refunds. It might have held that the Commissioner's ignorance of these facts and figures, which were necessary to fix the *amounts* of the credits or refunds, was not material because both could readily be computed when the Collector had examined the accounts. The Court, however, chose to regard the "allowance" of the refund as a *conscious* act which could only become effective when the Commissioner *knew* the facts and could determine the *exact amount* which should be refunded. For the Court in the portion of the opinion quoted above, referring to the date when the Commissioner finally approved the schedules after they were returned to him by the Collector, said:

> "This we think is the real date of allowance. Until that time the exact amount of the refund is not fixed finally by competent authority."

Inasmuch as the amount of credits plus the amount of refund must in every case equal the total amount of overpayment, it is obvious that the amount of the credit and the amount of the refund are necessarily finally fixed and determined *simultaneously*. The credit and the refund are complements of each other. If the amount of the credit were finally fixed at any earlier date the amount of the refund would be necessarily fixed by the same act, for the refund is the balance of the overpayment after applying the credit. In view of the language of the Court in the *Girard Trust Company* case we are bound to say of the credit, as the Court there said of the refund, that it can not be regarded as *allowed* until "the exact amount * * * is * * * fixed finally by competent authority". The

language used by the Court indicates clearly enough that the date of the Commissioner's final approval was selected as the real date of allowance *because that was the date when the exact amount was finally fixed, not because that was the date when the Commissioner ordered the payment.* It seems to follow that in any case where the schedule of refunds and credits returned by the Collector is in fact approved by the Commissioner, that date under the *Girard Trust Company* case is the "real date of allowance" both as to credits and refunds, because that is the date when the amount of each is fixed finally by competent authority. This was the situation in the present case.

The following cases by analogy support the view that the Commissioner's final approval is the "real date of allowance" as to credits as well as refunds. *In Re Estate of Hall,* 155 Minn. 46, the Probate Court had made findings of fact and conclusions of law to the effect that the husband should

> "have and take his distributive share of the estate * * * under the provisions of the statutes of this state, the same as if said deceased had died intestate, in lieu of the provisions made for him by * * * said will".

The executor appealed under a statute which permitted appeal from an order or decree by which a "distributive share is allowed or payment thereof directed, or said allowance or direction refused". The Court said, p. 49:

> "The order does not purport to assign or distribute the property or any part thereof. It merely decides that respondent's rights are to be determined by the statute and not by the will. It does not give respondent the right to any specific property, or to any specific

> part or amount of the property. A further order or decree is necessary to carry it into effect. Before respondent will be in position to demand or receive any part of the property, a further order or decree must be made assigning it to him. * * * * * We think that respondent's claim to a distributive share of the personal property is not 'allowed' within the meaning of the statute, until an order or decree is made under which he is entitled to demand or receive it, or some part of it."

In *Zimmerman vs. Canfield,* 42 Ohio State 463, the question arose, in a proceeding relating to the taking of lands for a public purpose, whether the Commissioners had "fixed and allowed" compensation for the lands taken. The statute provided that claims should not be paid except upon the allowance of the Commissioner, etc., and the Court clearly indicated that the allowance was not made until the amount was fixed. The Court said, p. 468:

> "When the commissioners have caused to be entered upon their journal an order fixing and allowing the amount of compensation to a land owner who has made application therefor, they haxe exhausted their powers, and it only remains for the county auditor to draw his warrant on the county treasurer for the sum so allowed."

See also *McKnight vs. United States,* 13 Ct. Cl. 292, affirmed 98 U. S. 179, holding that allowance of a claim was the final action by the officer authorized under the law to act in the matter of such allowance and that all previous steps of accounting officers and others were merely preliminary.

These cases indicate the same conclusion as that stated by the Court in the *Girard Trust Company* case, namely,

that a claim is not "allowed" until its *amount* is fixed and determined, or until the official authorized to make the allowance, being advised of the amount, approves it. As appears from the *McKnight* case, just cited, the previous steps of accounting officers, etc., are preliminary. In the present case the Commissioner, in his original schedule, merely shows the amount of overassessment which is allowed. The Collector, who is the accounting officer for this purpose, determines how much of the overassessment is to be abated, credited and refunded respectively and reports back to the Commissioner. The Commissioner then examines and checks the figures reported by the Collector and, if found correct, gives his approval.

But it appears from the record that *if* the "Schedule of Refunds and Credits" discloses *no refundable items* of tax and no interest on credits

> "the instructions were to mark the original schedule of refunds and credits as cancelled, place it in a special loose leaf binder for reference, if necessary, to likewise mark the Bureau record copy as cancelled, indicate where the original was on file and file the Bureau record copy in its proper place according to the serial number"

and that in these cases no certificate was signed by the Commissioner of Internal Revenue. (Rec. p. 35.)

It would not seem difficult, even in these cases where the Commissioner does not actually sign the schedule, to find *in this procedure a sufficient official action on the part of the Commissioner approving the Schedule of Refunds and Credits* as returned to him by the Collector. There must be the same examination of the schedule even where there are no refunds to be made and no interest to

be paid on allowed credits, because there is the same necessity for checking the action of the Collector to see that the amounts of abatements and credits which he has allowed do not exceed the amount of the overassessment approved by the Commissioner on his original Schedule of Overassessments. (Rec. p. 39, bottom of page.)

It is argued for the Government that a refund can not be made until after the credit has been allowed and applied and it is attempted to be inferred that some substantial time must elapse between the allowance of the credit and the allowance of the refund. No good reason appears, however, why the allowance of refund and credit may not be *simultaneous*. It is certainly clear that neither credit nor refund can be allowed until it has been found and determined that the taxpayer has *overpaid* his proper tax. So far as actual determination of amounts of credit and refund are concerned, the determination of one automatically determines the other, for the sum of the two must equal the amount of the overpayment, and it is quite as consistent to follow the *Girard Trust Company* case and hold that the allowance or appoval of both takes place when the Commissioner finally approves the Schedule of Refunds and Credits as to adopt the Government's contention that, while refunds are allowed at the time of this final action, credits are to be deemed to have been allowed at the time of the original Schedule of Overassessments, *before the Commissioner had any knowledge either whether the taxpayer had overpaid or whether he owed any taxes for other years.*

It is not necessary to conclude, as is argued in the Government's brief, that if the date of final approval by the Commissioner is the correct date, then the credits are illegal unless the second schedule, to wit, the authoriza-

tion to the Disbursing Clerk, is signed by the Commissioner. The official approval of the Collector's action which is necessarily involved in the Commissioner's acquiescence, after the accounts have been thus checked in the Commissioner's office, may well be deemed equally effective as a final allowance of credits as if the schedule had contained items of refund and so had been signed by the Commissioner to authorize the refund payments. In other words, the "cancellation" of the Schedule of Refunds and Credits and the filing of the Bureau copy may be quite as effective, as an official act of the Commissioner, as the signing of the authorization to the Disbursing Clerk.

Indeed, the cases where an actual signing of the authorization to the Disbursing Clerk is not required must be very rare as the Schedules of Overassessment and the subsidiary Schedules of Refunds and Credits ordinarily refer not to a single taxpayer but to a large number of taxpayers, and obviously if any one of these was entitled to a refund, or to interest on an allowed credit, the authorization to the Disbursing Clerk would be signed by the Commissioner. It also seems a fair assumption that credits allowed would ordinarily carry interest so that the authorization to the Disbursing Clerk would be signed by the Commissioner simply for that reason, if for no other. We assume it will not be argued that the signing by the Commissioner of the authorization to the Disbursing Clerk does not constitute his approval of the entire Schedule of Refunds and Credits even though there were but a single refund or interest item to be paid.

It may be appropriate as bearing on the view taken by the Treasury Department itself as to the date of the allowance of the credit in the case now under considera-

tion, to refer to the so-called "Certificate of Overassessment" (not to be confused with the "Schedule of Overassessments" which was signed March 29, 1924) which was sent to this respondent (plaintiff) with the refund check *after* the final Schedule of Refunds and Credits which was signed on August 7, 1924. This Certificate of Overassessment appears as the last photostat but one between pages 16 and 17 of the Record. This Certificate of Overassessment bears no date but it obviously *followed* the final approval of the Schedule of Refunds & Credits by the Commissioner, because it comes from the Commissioner's office, indicates the amount of abatement, the amounts of the credits in detail, and the amount of the refund; and it purports to carry the treasury check for the refund. It will be noted that this Certificate of Overassessment states that the amount of the overassessment "*will be* abated, credited or refunded as indicated below". Even at this late date, therefore, the credit is apparently to be made in the future.

In Any Event the Decision in the Present Case Is Clearly Right and Should Not Be Reviewed Because Under No Circumstances Can the Date of "Allowance" Be Earlier Than July 14, 1924, the Date of the Collector's Subsidiary "Schedule of Refunds and Credits".

Even if the foregoing argument were unsound, it is certainly clear that the amount of the credit was not "finally fixed by competent authority" and, consequently, can not be regarded as "allowed" in any case earlier than the date of the Collector's certification of

the schedules which he returned to the Commissioner, namely, July 14, 1924.

The form of the transaction and the language of the communications between the Commissioner and the Collector amply support this view. The authorization of the Commissioner on the original schedule of overassessments is directed to the Collector and contains the following significant language:

> "The amounts listed in column 4 as *overassessments* (or *reductions of tax liability*) are hereby approved. * * *.
>
> You will immediately *check such items against the accounts* of the several taxpayers *and determine whether the amounts* in which the tax liabilities have been reduced *should be respectively abated,* in whole or in part and make such abatements * * .
>
> If any part of any such item *is found to be an overpayment* you will examine all accounts of the taxpayer for other periods *and apply the overpayment as a credit against the taxes* due, if any, making the appropriate entries in your accounts * * * . Such credits will be entered in column 9 and placed in column 5 of a subsidiary schedule of refunds and credits.
>
> The balance, if any, of the overpayment will be entered in column 12 and placed in column 4 of the subsidiary schedule referred to above".

Nothing in this authorization purports to be an allowance of either a *credit* or a *refund.* It is merely a statement of the amounts in which taxpayers have been *overassessed* and a direction to the Collector to examine the accounts and determine to what extent the taxpayers' liability *should be abated;* and *if the proper amount* of tax, as thus determined by the Commissioner, *has been*

overpaid then the Collector is to examine all accounts of the taxpayer for other periods and *apply the amount of the overpayment as a credit* on these other taxes. Then if there remains any balance of the overpayment, such balance is to be listed as the amount refundable to the taxpayer.

The language of the statutes which we have quoted above indicates clearly that *before any credits can be allowed the fact of overpayment must appear.* In Section 252 (a) of the 1921 Act it is provided that

> "If upon examination of any return of income * * * *it appears that an amount of* * * * *tax has been paid in excess of that property due,* then * * * the amount of the excess shall be credited against any income * * * taxes * * * due from the taxpayer, etc." (Italics ours.)

Section 281 (a) of the 1924 Act provides that

> "Where there has been an overpayment, etc., the amount of such overpayment shall be credited, etc."

Until the Collector has made his investigation of the taxpayer's accounts and has ascertained how much of the overassessment has been actually overpaid and how much of this overpayment is to be claimed by the Government on unpaid taxes for other years, neither the Collector nor anyone else can determine what the credit is to be. We have already noted the concession on the part of the Government that there is no official action by the Collector in the matter until he certifies the schedules which are to go back to the Commissioner. (Rec. p. 40.) These schedules he certified in the present case on July 14, 1924, and if the date of "allowance" of the credit is to be moved back from the date when the Commissioner affixes his final approval to the schedules, it can not be

fixed earlier than the date when the Collector, on behalf of and under the express authorization of the Commissioner, finally determined the amount of the credit. The Collector is the subordinate of the Commissioner and his action in determining and applying the credits is taken under the Commissioner's *express authority.* His action, therefore, may be deemed the action of the Commissioner for the purpose of "fixing finally by competent authority" the "exact amount" of the credit. This act of the Collector is the "ministerial act of another administrative officer" which is referred to by Judge Brewster in *Boston Buick Co.* v. *United States,* supra, as being "necessary before it can be determined that there will be any credit or before the exact amount of it can be ascertained".

It is argued on behalf of the Government that the date of the allowance or application of these credits by the Collector on the taxes for other years can not possibly be treated as the date of allowance, because only the Commissioner is authorized to make such allowance. But there is nothing inconsistent with the Commissioner's prerogative and authority in the matter, in holding that when the Collector, after examining the taxpayer's accounts, determined the amount of the credit and applied it to other taxes due, being directed so to do by the Commissioner, he then, as the agent and representative of the Commissioner for this purpose, "allowed" the credit. In any large corporate organization and especially in the Bureau of Internal Revenue of the United States, many acts which are the function of the head of the organization to perform, must be done by other individuals under delegated authority. Here was no delegation of judicial discretion, but merely the delegation of authority to do a ministerial act, namely, to examine the accounts and

find how much had been overpaid, then to examine the accounts of other years and apply the overpayment as a credit.

If it is argued that this action of the Collector can not be final because it may be reversed or disapproved by the Commissioner, the answer is obvious, that it may well be deemed final unless and until so reversed or disapproved. As the court said in the *Girard Trust Company* case, page 170:

> "The mere fact that he can reverse a final allowance does not prevent its being a final allowance, any more than when a court renders a judgment, its ability within the term to set it aside or change it affects its finality, if it is not changed."

CONCLUSION.

In conclusion the respondent respectfully submits not only that no valid ground appears to justify the issuance of the writ prayed for, but that all the considered decisions of the lower courts are unanimous in following the dictum by Chief Justice Taft in the *Girard Trust Company* case; that the rule so laid down is correct and that even if there were reasonable doubt, which the respondent denies, such interest as the issue raised by the petitioner presents is almost wholly an historical interest and that the petition should be denied.

Respectfully submitted,

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